

Doc Code: AP.PRE.REQ

PTO/SB/33 (07-05)

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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional)	
		Hiddink 1-12	
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents P O Box 1450 Alexandria VA 22313-1450" [37 CFR 1.8(a)]  on _____  Signature _____  Typed or printed name _____	Application Number	Filed	
	10/670,747	9/25/2003	
	First Named Inventor	Hiddink et al.	
	Art Unit	Examiner	
	2419	Blanche Wong	
<p>Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.</p> <p>This request is being filed with a notice of appeal.</p> <p>The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.</p> <p>I am the</p> <p><input type="checkbox"/> applicant/inventor</p> <p><input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed (Form PTO/SB/96)</p> <p><input checked="" type="checkbox"/> attorney or agent of record Registration number <u>36,597</u></p> <p><input type="checkbox"/> attorney or agent acting under 37 CFR 1.34 Registration number if acting under 37 CFR 1.34 _____</p> <p>NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.</p> <p><input type="checkbox"/> *Total of _____ forms are submitted.</p>			

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**Patent Application**

5 Applicant(s): Hiddink et al.  
Case: 1-12  
Serial No.: 10/670,747  
Filing Date: September 25, 2003  
Group: 2419  
10 Examiner: Blanche Wong  
  
Title: Method and Apparatus for Rate Fallback in a Wireless Communication System

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15 MEMORANDUM IN SUPPORT OF  
PRE-APPEAL BRIEF REQUEST FOR REVIEW

20 Mail Stop AF  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

25 Sir:

The present invention and prior art have been summarized in Applicants' prior responses.

STATEMENT OF GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

30 The present application was filed on September 25, 2003 with claims 1 through 25. Claims 1 through 25 are presently pending in the above-identified patent application. Claims 1-20 were rejected under 35 U.S.C. §102(b) as being anticipated by Johnson et al. (European Patent Number EP 1 096 729 A1; hereinafter Johnson). The Examiner indicates that claims 21-25 would be allowable if rewritten to overcome the rejection under 35 U.S.C. §112, second paragraph. Applicants note that the present Office Action does not contain a rejection under 35 U.S.C. §112, second paragraph, but have addressed the section 112 rejection of the Office Action dated July 28, 2008.

ARGUMENTS

Section 112, Second Paragraph, Rejections

Claims 1-25 were previously rejected under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Regarding claim 21, the Examiner asserted that it is unclear what is meant by “to increase said retransmission data rate for a subsequent frame,” whether this increase is done after the reduction, whether this increase is progressive, and whether this increase is performed by the rate selection mechanism.

Applicants note that claim 21 was previously amended to clarify that the cited step is performed by the rate selection mechanism. Applicants also note that claim 21, as amended, requires that a transmission data rate for a subsequent frame is increased. Thus, the claim clearly requires that the transmission rate is increased. The specification discloses exemplary embodiments; the frame for which the transmission rate is increased and whether the increase is progressive are design choices, as would be apparent to a person of ordinary skill in the art.

Applicants believe that the cited amendment addressed the Examiner’s concerns and respectfully request that any pending section 112, second paragraph, rejection be withdrawn.

Independent Claims 1, 11 and 21

Independent claims 1, 11, and 21 were rejected under 35 U.S.C. §102(b) as being anticipated by Johnson. Regarding claims 1 and 11, the Examiner asserts that Johnson teaches a rate selection mechanism (FIG. 2; paragraph [0024]) that progressively reduces said retransmission rate (lower data rate) to at least one lower transmission data rates (lower data rate) only for said current frame if an acknowledgement is not received for a current frame (step 405 in FIG. 4; paragraph [0028]; col. 9, line 58, to col. 10, line 1). In the Response to Arguments section of the Office Action, the Examiner asserts that the limitation “at least one of two or more” can be interpreted as “at least one” or one. The Examiner asserts that, even with the word “progressively”, there can only be one reduced lower value. The Examiner further asserts that, if Applicant is arguing a choice or selection between two or more lower values, such a limitation is not recited in the claim language.

As the Examiner acknowledges, Johnson teaches that the transmission data rate of a data packet is reduced from a “higher data rate” to a “lower data rate.” Johnson does *not*, however, disclose or suggest that the retransmission data rate is progressively reduced to at least one of two or more lower retransmission data rates. Applicants note that the requirement for two or more lower retransmission data rates is an affirmative limitation that is *not* disclosed by Johnson. Regardless of whether the progressive reduction is performed to one lower data rate, or to two lower data rates, the requirement for two or more lower retransmission data rates cannot be read out the claims. Thus, the Examiner’s interpretation that “the limitation ‘at least one of two or more’ can be interpreted as ‘at least one’ or one” is *not* correct; the prior art must disclose or suggest two or more lower data rates to read on the cited claims. Independent claims 1, 11, and 21 require that the retransmission data rate is progressively reduced to at least one of two or more lower retransmission data rates. Support for this limitation can be found on page 2, lines 21-22, and page 3, lines 3-13, of the originally filed disclosure.

Thus, Johnson does not disclose or suggest that the retransmission rate is progressively reduced to at least one of two or more lower retransmission data rates, as required by independent claims 1, 11, and 21.

Dependent Claims 2-10, 12-20 and 22-25

Dependent claims 2-10, 12-20, and 22-25 were rejected under 35 U.S.C. §102(b) as being anticipated by Johnson.

Claims 2-10, 12-20, and 22-25 are dependent on claims 1, 11, and 21, respectively, and are therefore patentably distinguished over Johnson because of their dependency from independent claims 1, 11, and 21 for the reasons set forth above, as well as other elements these claims add in combination to their base claim.

All of the pending claims, i.e., claims 1-25, are in condition for allowance and such favorable action is earnestly solicited.

If any outstanding issues remain, or if the Examiner has any further suggestions for expediting allowance of this application, the Examiner is invited to contact the undersigned at the telephone number indicated below.

The Examiner's attention to this matter is appreciated.

Respectfully submitted,



5     Date: March 6, 2009

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